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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1994

ALVA Z. MCGRATH, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I

Whether a witness must be declared unavailable before the Confrontation Clause analysis of *Idaho v. Wright* can be applied to the witness' out-of-court statement offered under a residual hearsay exception?

### II

Assuming this Honorable Court finds that a witness must be declared unavailable before applying the Confrontation Clause analysis of residual hearsay of *Idaho v. Wright,* whether a witness' appearance solely to announce her refusal to testify constitutes unavailability for purposes of the Confrontation Clause?

### III

Whether this Court's decision in *Idaho v. Wright* applies to an analysis of residual hearsay irrespective of a Confrontation Clause violation?

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The petitioner, Alva Z. McGrath, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on 6 May 1994.

### OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, reported at 39 M.J. 158 (C.M.A. 1994) is located at Appendix A. The unpublished decision of the United States Air Force Court of Military Review, *United States v. McGrath,* ACM 28358 (A.F.C.M.R. 11 May 1992) is reprinted at Appendix B.

## JURISDICTION

The final order of the United States Court of Military Appeals was entered on 6 May 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the Constitution of the United States provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

## STATEMENT OF THE CASE

At a general court-martial convened at Hahn Air Base, Germany, petitioner was convicted, by military judge sitting alone, of carnal knowledge, sodomy, and indecent acts with his 14-year old daughter. He was sentenced to a dishonorable discharge, 10 years confinement, and reduction to the lowest enlisted grade. At trial, the government relied on statements made by petitioner's daughter to a pediatrician under a residual hearsay exception.

On 9 June 1989, the petitioner's 14-year-old daughter, A.M., told a school counselor that she had been sexually abused by the petitioner, her natural father. (R. 171) The Mental Health Clinic at Hahn Air Base Hospital was notified of these allegations, as were the Office of Special Investigations (OSI) and the base legal office. (R. 55, 78, 171) Special Agent (SA) Kenneth Sallinger of the OSI and Ms. Leann Steinbach, a German national associated with the OSI, picked up A.M. at school and took her to the Mental Health Clinic. (R. 80, 82) They were met there by Captain Timothy Friesen, a staff psychologist who had previous contact with A.M., and Captain Deborah Hall,

an attorney with extensive experience in prosecuting child abuse cases. (R. 54-56) The first interview of A.M. began at the Mental Health Clinic in the presence of Captain Friesen, SA Sallinger, Ms. Steinbach, Captain Hall, and Sergeant Donitta Gardiner, a technician assigned to the Mental Health Clinic who was also previously acquainted with A.M. (R. 56, 82, 172) Although A.M. began to talk in general terms about the allegations, she became increasingly embarrassed and uncomfortable talking about the incidents in front of men. (R. 57, 173) Captain Freisen and SA Sallinger left the room. Captain Hall continued with the interview. (R. 57) Captain Hall was not aware of what specific allegations had been made by A.M. At trial, Captain Hall stated that she did not offer suggestions to A.M. as to what might or must have happened. (R. 57, 72, 76) A.M. demonstrated the abuse by petitioner with anatomically correct dolls. (R. 59) According to Captain Hall's testimony, A.M. appeared embarrassed and slightly upset, but in control during the interview, which lasted between 30 minutes and one hour. (R. 60)

Following this interview, Captain Hall, SA Sallinger, and A.M. went to the OSI offices on the base. (R. 61) Captain Hall told A.M. that they were there "to put down everything that you told me in writing." (R. 61) A.M. essentially dictated her statement to Captain Hall, who typed the statement on a computer. (R. 61) As Captain Hall typed, A.M. sat next to her and reviewed the statement, making whatever corrections and additions she wished to make. (R. 61-62) A.M. read the statement from the computer screen after it had been typed, read it again after it was printed, and signed it under oath. According to Captain Hall's testimony, A.M. did not recant or retract any portion of the statement made during the interview at the Mental Health Clinic. (R. 63) According to Captain Hall's testimony, A.M. understood the words

used in the statement, including specific sexual terms, and appeared to understand the oath given her prior to signing the statement. (R. 63, 69)

On 20 June 1989, eleven days later, A.M. went to the OSI office and told SA Sallinger that she had more information to tell him regarding the allegations and about other acts of her father. (R. 99, 109) Virtually the same dictation process was used to reduce A.M.'s statement to writing with SA Sallinger as the typist. (R. 99-100) According to SA Sallinger's testimony, A.M. appeared a "little nervous", but in control at that time. (R. 99) A.M. again proofread the statement as it was being typed and made corrections she felt were necessary. According to SA Sallinger, he did not offer suggestions or make any corrections other than those requested by A.M. (R. 100) A.M. read the statement after it was printed, swore to it, and signed the statement. (R. 102) This meeting lasted about one hour. (R. 99)

When confronted by the authorities on 9 June 1989, the petitioner made a six-page, handwritten confession.

At trial, defense counsel moved to suppress the petitioner's confession on the grounds that it was uncorroborated. The Government's response was that the confession was corroborated by the A.M.'s two pretrial statements. The Government called A.M. as a witness. (R. 19)

A.M. testified that she was 14 years old and the daughter of the petitioner. (R. 19) When asked about the allegations and the statements she provided, she refused to answer. (R. 20-21) A.M. acknowledged that she was present at trial pursuant to an order from the German civil authorities, but that she had no intention of testifying against her father. (R. 21-23) She repeatedly replied "I refuse to answer that" when questioned about the abuse. (R. 21) A.M. acknowledged the importance of the oath she took prior to testifying, and in connection with each

of the statements. (R. 24) She specifically denied lying under oath in her prior statements. (R. 25)

The military judge explained to A.M. the importance of her testimony and of resolving the allegations against her father. (R. 41, 43-44) A.M. remained steadfast in her refusal to testify. She said she loved her family, did not want to hurt them any more, and did not want her father to go to jail. (R. 41, 45-46) She felt some of the charges against him were "a little heavy." (R. 45) While she felt that her father should be punished, A.M. said that he had gone through enough while facing the charges, and that "maybe he was punished, 'cause he knows if he tries it again, it would be a whole lot worse." (R. 46)

The military judge explained that the Air Force had an interest in deciding whether the allegations were true, to which A.M. replied,

> A. Well, yes, they would like to know, but I don't want to testify, and that's just how I feel. I just don't want to testify.
>
> Q. Has anybody, anybody at all—family, friend, or whatever—come sat down with you and said—well, this is what's going to happen if you testify, and this is what happens if you don't testify?
>
> A. No, I really—I have been told that, but they haven't said—well, your father is going to go to jail if you testify, and he's not going to jail if you don't testify and all—but they gave me an idea like—if you testify, there may be enough evidence to put your father in jail, and if you don't testify, there may not be enough to end up putting your father in jail, and I got the idea that I don't want to testify. I don't want my father in jail.

(R. 47) After again stressing the need for her cooperation to resolve the charges, the military judge asked:

Q. Is there something that I could do that would make it easier for you to testify–

A. (Interrupting) I don't want to testify.

Q. To just tell your story?

A. I don't want to testify. That's that. I don't care where I am, who I'm with–I don't want to testify.

Q. Would it help if I asked the spectators to leave?

A. No, I don't want to testify. Like I said, I don't care who's there, I don't care where I am–I don't want to testify.

Q. Just one final question. What are your feelings right now about your father?

A. Very sad, because he may go to jail and lose his family, his job, and probably everything else he has.

(R. 47-48)

The Government sought to admit the 9 June and 20 June statements as Prosecution Exhibits 4 and 5 respectively, under the "residual hearsay rule" of Military Rule of Evidence 804(b)(5). The military judge found that A.M. was unavailable under Military Rule of Evidence 804(a)(2). (R. 52) He then heard the testimony of Captain Hall (R. 53-77) and SA Sallinger (R. 77-127) regarding the creation of the statements.

Trial defense counsel objected to the admission of the statements and offered the testimony of four witnesses. Sergeant Deborah McQuiston, the Area Defense Paralegal, testified that, on the morning of trial, A.M. said that "five percent" of the 20 June statement was untrue.

(R. 151) Sergeant McQuiston was not privy to any other part of A.M.'s conversation with the defense counsel at which this statement was initially made; A.M. was asked to repeat the statement for Sergeant McQuiston later. Staff Sergeant David Terrell, a friend of the petitioner, testified that in his opinion A.M. was not always truthful. (R. 155-63) Captain Friesen, who had been A.M.'s counselor since December 1988, expressed his opinion that A.M. would not intentionally lie, although the way she relates to individuals, particularly men, "might cause her to respond the way she believed was expected." (R. 175) Sergeant Donitta Gardiner, who had developed a rapport with A.M., was a facilitator of a therapy group, recalled what she felt may have been leading questions during the 9 June interview in the Mental Health Clinic. (R. 187-95) Sergeant Gardiner admitted she was not present when either statement was reduced to writing and she believed A.M. to be truthful. (R. 193)

The military judge concluded that A.M.'s statements were admissible under Military Rule of Evidence 804(b)(5) and made specific findings of fact regarding the reliability of the statements. (R. 211-14) Included in the military judge's findings was the following:

> The court also relies on the fact that the accused confessed to much of the sexual misconduct in his 9 June '89 statement to the OSI, Prosecution Exhibit 2 for Identification; that is, he confessed to the fondling of his daughter's breasts and vaginal area, to having her fondle his penis, confessed to performing oral sodomy on her on a number of occasions, to rubbing his penis on her vagina. Again, his confession substantially supports her statements as to the times and places indicated by the victim and as to the activity which allegedly occurred.

(R. 214)

On appeal to the Air Force Court of Military Review, the petitioner argued that the trial judge erred when he admitted A.M.'s out-of-court statements under Military Rule of Evidence 804(b)(5). The Air Force Court of Military Review found that A.M. was unavailable and her statements bore adequate indicia of reliability as required by Military Rule of Evidence 804(b)(5). In addition, the Court of Review noted that A.M.'s statements were corroborated by the petitioner's confession. *United States v. McGrath,* ACM 28358, unpub. 7 (A.F.C.M.R. 11 May 1992) (Appendix B).

Petitioner appealed the decision of the Air Force Court of Military Review to the United States Court of Military Appeals. The Court of Military Appeals held that petitioner waived his right to cross-examination when he failed to question A.M. at trial. Thus, the Court of Military Appeals held, the petitioner's right to confrontation was not violated and the trial judge could properly review corroborating evidence to support the trustworthiness of out-of-court statements offered under a residual hearsay exception. *United States v. McGrath,* 39 M.J. 158, 164 (C.M.A. 1994).

## REASONS FOR GRANTING THE WRIT

### I

### THIS COURT HAS NOT DETERMINED WHETHER A WITNESS MUST BE DECLARED UNAVAILABLE BEFORE THE CONFRONTATION CLAUSE ANALYSIS OF *IDAHO v. WRIGHT* CAN BE APPLIED TO THE WITNESS' OUT-OF-COURT STATEMENT OFFERED UNDER A RESIDUAL HEARSAY EXCEPTION.

In *Idaho v. Wright,* 110 S. Ct. 3139 (1990), this Court left unanswered whether, before a child's out-of-court

statements can be admitted under a residual hearsay exception, the Confrontation Clause requires the government to show that a child witness is unavailable at trial, and, if so, what that showing requires. Petitioner's case raises this issue and provides an opportunity for this Court to address this question. A brief review of the case law in this area helps demonstrate the problem.

In *Ohio v. Roberts,* 448 U.S. 56 (1980), this Court held that the admission of hearsay statements into evidence against a criminal defendant did not violate the Confrontation Clause under two circumstances: when the statements were within "firmly rooted" hearsay exceptions, in which case the Court inferred their reliability "without more", or when they otherwise indicated reliability through "particularized guarantees of trustworthiness." *Roberts* at 66.

A decade later, in *Idaho v. Wright,* supra, the Court continued to rely on the holding of *Roberts* in determining the admissibility of hearsay statements under the Confrontation Clause and continued to focus on the trustworthiness of hearsay statements. *Wright* at 3150. In *Wright,* the government introduced statements made by a child victim to a doctor in a counseling session concerning sexual abuse by her mother and the mother's boyfriend. The statements were offered under one of Idaho's residual hearsay exceptions, rule 803(24). *Wright* at 3144. The trial court, in ruling that the Confrontation Clause did not prohibit the admission of the child's statements, relied on, *inter alia,* the presence of physical evidence to corroborate that sexual abuse had occurred. *Wright* at 3152.

In judging the reliability of statements not falling within a "firmly rooted" hearsay exception, the *Wright* court excluded the use of corroborating evidence in determining the reliability of hearsay offered as evidence. *Id.*

Unfortunately, *Idaho v. Wright* did not resolve the question whether, before a child's out-of-court statements were admitted, the Confrontation Clause *required* the prosecution to show that a child witness is unavailable at trial—and, if so, what that showing required. For purposes of deciding *Wright,* the Court assumed without deciding that, to the extent the unavailability requirement applied in the case, the child witness was unavailable within the meaning of the Confrontation Clause. *Wright* at 3147.

Unless and until this Court determines whether a witness must first be declared unavailable before the Confrontation Clause analysis of *Wright* can be applied to residual hearsay statements, trial courts are left in the dark to devise their own standards of availability and unavailability.

II

IF THIS HONORABLE COURT WERE TO HOLD, FOR THE FIRST TIME, THAT A WITNESS MUST BE DECLARED UNAVAILABLE BEFORE APPLYING THE CONFRONTATION CLAUSE ANALYSIS OF RESIDUAL HEARSAY UNDER *IDAHO v. WRIGHT,* THE NEXT LOGICAL QUESTION WHICH NEEDS TO BE RESOLVED IS WHETHER A WITNESS' APPEARANCE SOLELY TO ANNOUNCE HER REFUSAL TO TESTIFY CONSTITUTES UNAVAILABILITY FOR PURPOSES OF THE CONFRONTATION CLAUSE.

If this Court establishes a requirement of unavailability prior to applying the Confrontation Clause analysis of *Idaho v. Wright,* then this Court needs to set out what is required for a showing of unavailability, because occa-

sions arise wherein a witness may appear at trial for limited purposes, but not appear before the jurors to testify against the accused.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

In the case *sub judice,* the Court of Military Appeals concluded that the Confrontation Clause was satisfied where the witness appeared, refused to testify, and was not cross-examined by the defense. Under these circumstances, the Court of Military Appeals found that petitioner had "waived cross-examination." *United States v. McGrath,* 39 M.J. 158, 163 (C.M.A. 1994). For this holding, the majority in *McGrath* relied on the decision of *United States v. Thevis,* 665 F.2d 616, 632-33 (5th Cir.), cert. denied, 456 U.S. 1008 (1982) (waiver of right to confrontation is "a fortiori" waiver of right to raise hearsay objection).

In *United States v. Thevis,* however, there was clear and convincing evidence that the defendant murdered the very witness whose grand jury statements the prosecution sought to introduce. The *Thevis* court held:

> a defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right to confrontation under the *Zerbst* standard. A defendant who undertakes this conduct realizes that the witness is no longer available and cannot be cross-examined. Hence, in such a situation the defendant has intelligently and knowingly waived his confrontation rights.

665 F.2d at 630.

There was no finding by the military judge in the case *sub judice,* that petitioner caused the witness not to testify.

Indeed, there was no evidence presented that petitioner caused the witness not to testify.

The victim's refusal to testify in the case *sub judice* is also clearly distinguishable from prior case law in which this Court held that the Confrontation Clause was not violated by admitting a declarant's out-of-court statement as long as the declarant is testifying as a witness and is subject to full and effective cross-examination. In *Delaware v. Fensterer,* 474 U.S. 15 (1985), a government expert witness had reached an incriminating conclusion regarding a piece of evidence (a strand of hair), but he could not, at trial, remember which of three possibilities led him to that ultimate conclusion. Fensterer complained that he could not effectively cross-examine, and thus discredit the expert with respect to his conclusion. This Court held that Fensterer was not denied confrontation, noting:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination . . . Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish . . .

474 U.S. at 19-20.

In *United States v. Owens,* 484 U.S. 554 (1988), an assault victim made an out-of-court identification of the defendant as his assailant less than a month after the assault. By the time of trial, the victim could remember having identified Owens as his assailant, but he could no longer remember having seen his assailant. This Court permitted receipt of the out-of-court identification, even though cross-examination was impossible. Quoting from *Fensterer,* the Court reiterated that it was the "opportunity for effective cross-examination" that was guaran-

teed by the Confrontation Clause. Even if the victim had no memory, the opportunity guaranteed by the Constitution was offered. "It is sufficient," said Justice Scalia for the Court, "that the defendant has the opportunity to bring out such matters as . . . the very fact that he [the witness] has a bad memory." 484 U.S. at 559.

In the case *sub judice,* A.M., the victim, appeared at trial for a limited purpose and refused to answer any questions concerning the charged offenses or her prior written statements. Thus, A.M. cannot be said to be a hearsay declarant who is present at trial before the jury and subject to unrestricted cross-examination. A.M. could not be cross-examined concerning a bad memory (like the witnesses in *Fensterer* and *Owens*), she refused to testify.

The fact scenario in the case *sub judice* is analogous to situations in which a witness relies on a Fifth Amendment right against self-incrimination and refuses to testify. A number of federal and state courts have found the witness to be "unavailable" for Confrontation Clause purposes where the witness refuses to testify based on a Fifth Amendment right against self-incrimination. *See United States v. Bakhtiar,* 994 F.2d 970 (2d Cir.), cert. denied, 114 S. Ct. 554 (1993); *United States v. Matthews,* 20 F.3d 538 (2d Cir. 1994); *Phillips v. Wyrick,* 558 F.2d 489 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978); *People v. Reyher,* 728 P.2d 333 (Colo. Ct. App. 1986); and *State v. Hansen,* 312 N.W.2d 96 (Minn. Ct. App. 1981). *See also, People v. Francis,* 200 Cal. App. 3d 579 (Cal. Ct. App. 1988) ("a witness who is physically available yet refuses to testify, after the court has used all available avenues to coerce such testimony, is unavailable. This is true even though such a witness does not fit neatly into one of the subdivisions of [the State's evidence code].").

As evidenced by the foregoing case law, courts have addressed all manner of witness "unavailability." The facts in

petitioner's case do not fit squarely into any of the foregoing. A clear standard for resolving issues of witness availability with facts similar to petitioner's will help eliminate the needless confusion in this important area.

## III

### THIS COURT NEEDS TO CLARIFY WHETHER ITS DECISION IN *IDAHO v. WRIGHT* APPLIES TO AN ANALYSIS OF RESIDUAL HEARSAY IRRESPECTIVE OF A CONFRONTATION CLAUSE VIOLATION, BECAUSE LOWER COURTS HAVE BECOME ENTANGLED IN THE LEGAL MORASS CREATED BY THE OVERLAP OF THE HEARSAY RULE AND CONFRONTATION RIGHTS.

This Court's treatment of the Confrontation Clause in the context of out-of-court statements sought to be admitted against a criminal defendant at trial, pursuant to an exception to a residual hearsay exception, has created more questions than answers. For example, this Court's decision in *Idaho v. Wright,* supra, purported to clarify the question of whether corroborating evidence used to support the trustworthiness of an out-of-court statement offered under a residual hearsay exception violated the Confrontation Clause. Unfortunately, although the *Wright* Court created a Confrontation Clause analysis to answer the question before it, the decision left unanswered whether the analysis applied to evidence used to support the trustworthiness of a residual hearsay exception irrespective of a violation of the Confrontation Clause.

In *Wright,* a mother was convicted of lewd conduct with a minor after she held her daughters, then aged two and five, while her male codefendant had sexual intercourse with them. The younger daughter, who was three at the

time of trial, was found to be "not capable of communicating to the jury" and did not testify. *Wright* at 809. Her account of what occurred, however, came into evidence through the testimony of a pediatrician who had questioned her. *Wright* at 809-10. The trial court permitted the testimony pursuant to Idaho's residual hearsay exception. The mother appealed her conviction on the ground that admission of the pediatrician's testimony regarding the young victim's inculpatory statements violated her Confrontation Clause rights. *Wright* at 812.

In affirming the Idaho Supreme Court's reversal of the mother's conviction, the Court first reviewed its decision in *Roberts,* supra. The *Wright* Court sought to clarify the Confrontation Clause requirement, as enunciated in *Roberts,* that incriminating hearsay admitted against a defendant bear "adequate indicia of reliability." *Wright* at 3153. Primarily, the Court focused on this reliability requirement as it pertains to hearsay admitted under a non-firmly rooted exception; that is, the Court formulated a test for determining what evidence constituted a "showing of particularized guarantees of trustworthiness" for non-traditional hearsay. *Wright* at 3147.

Since *Wright* did not involve a "firmly rooted" hearsay exception, but rather the residual, or catchall, hearsay exception, the Court delineated the conditions necessary for hearsay statements admitted under an exception that is not "firmly rooted." The statement must evince "particularized guarantees of trustworthiness" drawn from the "totality of the circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief." It "must be at least as reliable as evidence admitted under a firmly rooted hearsay exception" and must "be so trustworthy that adversarial testing would add little to its reliability." *Wright* at 820-21. In the absence of such a showing, hearsay statements will be pre-

sumed unreliable and will be barred by the Confrontation Clause from admission into evidence. *Wright* at 821.

The *Wright* court held that "particularized guarantees of trustworthiness" for hearsay are based on a consideration of the "totality of circumstances." *Wright* at 3148. However, it limited the scope of the consideration to those circumstances that "surround the making of the [hearsay] statement and that render the declarant particularly worthy of belief." *Wright* at 3148. The *Wright* court rejected the state of Idaho's contention that the totality of circumstances should also include other evidence at trial that corroborates the truth of the out-of-court statement. *Wright* at 3148. Thus, the Court held that in evaluating the reliability of residual hearsay, consideration of corroborative evidence violates a defendant's right to confront witness. *Wright* at 3150.

While the Court's holding in *Idaho v. Wright* addressed the issue of the particularized guarantees of trustworthiness of hearsay evidence for Confrontation Clause purposes, the opinion makes clear that the Court would apply the same analysis and proscriptions to the issue of the equivalent guarantees of trustworthiness for residual hearsay exception purposes.

First, while the *Wright* court stated it was not engrafting Confrontation Clause requirements onto hearsay analysis, it employed the "circumstantial guarantees of trustworthiness" test for residual hearsay as the starting point for its analysis of the "particularized guarantees of trustworthiness" required for Confrontation Clause analysis of residual hearsay. *Wright* at 3149. Quoting from *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979), the *Wright* court held that "[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based on those that existed at the time the statement was made and do not include those that may

be added by using hindsight." The Court in *Wright* believed that the "particularized guarantees of trustworthiness" required of hearsay for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. *Wright* at 3149. The *Wright* Court's rationale for invoking this rule was to prevent "admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial." *Wright* at 3150. The Court believed that the presence of corroborating evidence more appropriately indicated that any error in admitting the statement might be harmless, rather than that any basis exits for presuming the declarant to be trustworthy. *Id.*

The Supreme Court in *Wright* arrived at this holding despite federal circuit courts having almost uniformly looked for corroboration beyond the circumstances surrounding the making of the statement, when determining reliability under the Confrontation Clause. *See Idaho v. Wright: Is It a Step in the Wrong Direction in Determining the Reliability of Hearsay Statements for the Confrontation Clause?,* 52 Ohio State Law Journal 663 (1992); *Idaho v. Wright,* 110 S. Ct. at 3154, n. 2.

However, since *Wright,* federal circuit courts have enforced *Wright*'s prohibitions against corroborating evidence used to support residual hearsay. In *United States v. Accetturo,* 966 F.2d 631, 634 (11th Cir. 1992), the Eleventh Circuit Court of Appeals stated that "The Supreme Court has now stated unequivocally that independent corroborating evidence may not be used to evaluate the admissibility of hearsay evidence which the government seeks to have admitted pursuant to a residual hearsay exception." The First Circuit embraced the same interpretation. *United States v. Ellis,* 935 F.2d 385 (1st Cir. 1991)

*cert. denied,* 112 S.Ct. 201; *see also, United States v. Gomez-Lemos* 939 F.2d 236 (6th Cir. 1991); *Sherly v. Seabold,* 929 F.2d 272 (6th Cir. 1991) (statement of 82 year old victim, who suffered from memory loss after being beaten and robbed, and whose condition was so much worsened after the attack that she had to be placed in a nursing home, held inadmissible.). The Eighth Circuit interpreted *Wright* in the same fashion. *See McCafferty v. Leapley,* 944 F.2d 445 (8th Cir. 1991); *also see, United States v. George,* 960 F.2d 97 (9th Cir. 1992).

Many commentators agree with the interpretation that the *Wright* proscription applies to establishing particularized guarantees of trustworthiness in support of admission of evidence under residual hearsay exceptions. *See, e.g., Hearsay and the Confrontation Clause,* 41 Federal Bar News and Journal 133 (February 1994); *Constitutional Admissibility of Hearsay Under the Confrontation Clause; Reliability Requirement for Hearsay Admitted Under a Non-"Firmly Rooted" Exception—Idaho v. Wright,* 14 Campbell Law Review 347 (1992).

As is readily apparent from the foregoing, the *Wright* decision has created more questions in the area of confrontation and residual hearsay then it had hoped to answer.

## CONCLUSION

The entanglement of hearsay rules and the Confrontation Clause has created a legal morass for courts to wade through. "Firmly rooted" hearsay exceptions, which are presumptively reliable, are contrasted from "non-firmly rooted" hearsay exceptions, which must bear "circumstantial guarantees" of trustworthiness. "Circumstantial guarantees of trustworthiness" required for residual hearsay exceptions are weighed alongside "particularized

guarantees of trustworthiness" required under a Confrontation Clause analysis of residual hearsay. All the while, questions of witness availability and its effect on a defendant's right to confrontation abound.

The unifying theme for issues involving hearsay or the Confrontation Clause is "reliability." This Court needs to strike a balance between its "indicia of reliability" test and its "particularized guarantees of trustworthiness" test. A comprehensive yet clear standard to resolve issues involving hearsay exceptions and the Confrontation Clause will eliminate the needless confusion and reduce future litigation in this important area.

Respectfully submitted,

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July 1994

# APPENDICES

APPENDIX A

# U.S. COURT OF MILITARY APPEALS

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No. 68,260.
CMR No. 28358.

UNITED STATES, APPELLEE,

*v.*

ALVA Z. MCGRATH, TECHNICAL SERGEANT
U.S. AIR FORCE, APPELLANT.

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Argued Oct. 5, 1993.
Decided May 6, 1994.

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Accused was convicted by general court-martial, Dennis L. Olson, J., of multiple sexual offenses committed against his daughter. The United States Air Force Court of Military Review affirmed. Review was granted. The United States Court of Military Appeals, Cox, J., held that: (1) accused was not denied his rights under confrontation clause, and (2) military judge did not abuse his discretion in considering corroborating evidence to determine that victim's pretrial statements had sufficient indicia of reliability to satisfy residual hearsay exception.

Affirmed.

Sullivan, C.J., and Wiss, J., filed dissenting opinions.

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For Appellant: *Captain Ursula P. Moul* (argued); *Colonel Terry J. Woodhouse* (on brief); *Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, Major Mary C. Yastishock, Captain Marc. A. Fox.*

For Appellee: Major John H. Kongable (argued); *Colonel Richard L. Purdon* and *Colonel Jeffery T. Infelise* (on brief).

*Opinion of the Court*

COX, Judge:

At his trial, appellant, through various legal maneuvers, attempted to block the victim from testifying at the court-martial. Failing that, when offered the opportunity to cross-examine her, he declined. On this appeal, he now argues he was denied his Sixth Amendment right to be confronted by the victim at trial. As a result of this alleged denial, he contends that two of the victim's out-of-court statements should have been ruled inadmissible.[1] The exclusion of those statements, in turn, would leave his own pretrial confession "uncorroborated"—and thus inadmissible under Mil.R.Evid. 304(g).[2] We dispute that the Confrontation Clause is so malleable; and we affirm appellant's conviction.

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[1] The granted issue asks:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ADMITTING INTO EVIDENCE APPELLANT'S 9 JUNE 1989 STATEMENT AND THE 9 JUNE 1989 AND 20 JUNE 1989 STATEMENTS PURPORTEDLY GIVEN TO AGENTS OF THE AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS BY THE PUTATIVE VICTIM.

[2] Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984, provides in pertinent part as follows:

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. . . . If the independent evidence raises as inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.

I

Appellant stands convicted of multiple sexual offenses perpetrated on his natural daughter, A, who was between the ages of 13 and 14 at the time of the offenses.[3] Essentially, the victim made two sworn statements in June 1989 detailing appellant's misconduct, which allegedly occurred in the Federal Republic of Germany over the preceding year-and-a-half. When confronted by the authorities, appellant made a six-page, handwritten confession. There is no issue before us regarding the voluntariness of this confession.

Appellant was tried by a military judge sitting alone as a general court-martial at Hahn Air Base, Federal Republic of Germany. The court-martial opened on November 15,

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[3] The first specification alleged carnal knowledge on divers occasions over a 5-month period; the second specification alleged sodomy on divers occasions over the same 5-month period; the third and fourth specifications alleged committing indecent acts upon the body of the victim on divers occasions over periods of 1 year and of 1 and ½ months, respectively; the final specification alleged taking indecent liberties with the victim on divers occasions over a 17-month period. *See* Arts. 120, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 920, 925, and 934, respectively. Contrary to his pleas, appellant was convicted of these charges by a military judge sitting as a general court-martial at Hahn Air Base, Federal Republic of Germany. The judge sentenced appellant to a dishonorable discharge, confinement for 10 years, and reduction to E-1; the convening authority approved this sentence.

The Court of Military Review, in an unpublished 10-page opinion, found the evidence overwhelming that appellant *attempted* to commit carnal knowledge on the victim, but that court was not convinced beyond a reasonable doubt that penetration was achieved. Accordingly, the court affirmed the lesser-included offense of attempted carnal knowledge, Art. 80, UCMJ, 10 USC § 880. Unpub. op. at 8-9. The remaining charges and specifications were also affirmed. Reassessing the sentence, the court below affirmed the sentence except for confinement exceeding 9 years.

1989, with the defense moving to suppress appellant's confession. Counsel's basis for the motion was:

"We do not believe it can be properly corroborated."

The Government's response was that the confession was corroborated by the victim's pretrial statements. The Government's first witness was the victim, A.

She identified herself and stated: that she was appellant's 14-year-old daughter; that, until June 1989, she had been living with appellant "in the same household" in the Federal Republic of Germany; that, commencing in June 1989, she lived in a foster home for several months [in Germany]; and that recently she had moved back into the family home with her stepmother (appellant's wife), her two stepbrothers, and her stepsister. Appellant "was basically living in a dormitory" when she returned to the home.

When asked by the prosecutor if she had made "statements against" appellant in June 1989, she "refuse[d] to answer" the question. When asked if she "wish[ed] to retract" anything from the statements, she "refuse[d] to answer."

She acknowledged that she had "receive[d] an order from the German court" to appear at the court-martial and that was "the reason" she was present. She stated that she had "indicated" to the military prosecutor the day before the court-martial that she "had no intention of testifying against . . . [her] father." She said that her reason for not wishing to testify was to avoid "the potential harm it could do to . . . [her] father" and that she "didn't want to hurt . . . [her] family any more."

She also acknowledged, however, that she had taken "an oath back in June of this year"; that she had "promise[d] to tell the truth back then"; and that she had not lied under that June oath.

At this juncture in the proceedings, trial counsel requested the military judge to "make inquiry of the witness and, if necessary, given an order to the witness to testify in this case." The defense promptly requested an Article 39(a), Uniform Code of Military Justice, 10 USC § 839(a), session "for purposes of judicial notice of German law and to discuss other matters. . . ."

The discussion during the Article 39(a) session centered on the victim's apparent privilege under German law not to testify against her father, an issue previously identified and discussed at a pretrial conference. *See* RCM 802, Manual for Courts-Martial, United States, 1984. The prosecution conceded that, under the North Atlantic Treaty Organization's (NATO) Status of Forces Agreement and the pertinent implementing regulations, German law applied to the victim and that, under German law, she had such a privilege. In addition, the prosecution acknowledged that, pursuant to the treaty, the prosecution had been obliged to request the German court's to subpoena the victim to attend the court-martial. The prosecution disputed, however, the contention that the German privilege applied at the court-martial. The prosecution conceded, nevertheless, that neither the military judge nor the German courts had the authority to order the victim to testify should she decline.

The defense acknowledged that

> the witness is aware, was aware yesterday, that this was a provision of the German law, based upon her being told that, or having it confirmed by a German social worker. . . .

In addition, defense counsel argued that

> since her presence here is premised solely upon the German subpoena, which is the only power that can make her appear here, that she needs to be instructed

> under the German law of her rights and see if that is what she is essentially, in her inexperienced, perhaps unsophisticated way, is attempting to convey to this court. If so, Your Honor, we would submit that a motion to strike any testimony she gave without having been advised would be something the defense would raise, but we submit that there is no power that this court has to order her to testify under American law and, as we know, under German law here today.

Such an order to testify would have been, in the defense's view, "an improper order . . . because it cannot be enforced."

The military judge announced his decision "to talk with her and encourage her . . . to voluntarily talk," reserving the possibility of "issu[ing] her an order, realizing I may not be able to compel or to punish her for violation of that order." The defense promptly objected, arguing:

> Your Honor, the defense concurs that the goal of justice is to have her voluntarily testify, with the emphasis on the word "voluntarily," and we would submit, with all due respect, that if you, sitting up there with your judicial robes in the position of authority over her, give her an order, knowing that you cannot do anything about a refusal, but implying to her that you can, you have taken away, to a certain degree, one which we may not be able to measure, her voluntary choice to testify, under fear of a threat which is no threat. We do not submit that that is voluntary testimony and we would register our objection to that procedure.

When the prosecutor complained that the Government was trying to afford appellant confrontation but that it was the defense that was trying to prevent it, defense

counsel countered that the defense did not "write" the rules, but

> [w]e are doing everything in our power that is enabled us and allowed us under the law. What we are saying about this witness is, she appears to be the type of person who can be pressured, and we are concerned that inadvertently, or perhaps advertently, the military judge will pressure her into providing testimony which is suspect by the very nature of the pressure.

The witness was then recalled, and the military judge questioned her. He encouraged her to testify, but he did not order her to testify. Indeed, he informed her that he had no power to order her to testify or to punish her for refusing to testify. The victim told the judge that she decided herself not to testify against appellant.

Asked about her reasons for not wanting to testify, she mentioned the difficulty of testifying in front of people. When the judge sympathized with her and tried to offer encouragement on that point, she stated:

> And the other reason is because I don't want my dad to go to jail.

Again the judge sympathized with her, and she responded:

> I can only say that I guess I want my dad t be punished, but I've already talked to my mom about my dad when we have our—when we visit, that way dealing with how he feels and all. She just doesn't do this with me to know what's going on. I know he's been going through a whole lot more with all the charges that have been laid on him.

Again the judge offered sympathy, and she responded:

> And I feel maybe that's enough, maybe he has been punished, 'cause he knows *if he tries it again*, it would be a whole lot worse.

(Emphasis added.) She also allowed that "[s]ome of the charges that have been put on him I think are a little heavy."

Asked by the judge if anybody had "sat down with you and said—well, this is what's going to happen if you testify, and this is what happens if you don't testify?," she responded:

> No, I really—I have been told that, but they haven't said—well, your father is going to go to jail if you testify, and he's not going to go to jail if you don't testify and all—but they gave me like an idea like—if you testify, there may be enough evidence to put your father in jail, and if you don't testify, there may not be enough to end up putting your father in jail, and I got the idea that I don't want to testify. I don't want my father in jail.[4]

To the judge's question, "Do you feel if you testified that he might go to jail?," the victim responded: "Yes."

At the conclusion of the judge's questioning of the witness, the defense was offered an opportunity to question her. The defense declined. Ultimately, the military judge received prosecution exhibits 4 and 5 in evidence under the "residual hearsay rule" of Mil.R.Evid. 804(b)(5).[5] *See*

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[4] Evidently it was this comment that prompted the Court of Military Review to observe that the victim had received "a short course on the law of evidence and how her testimony or lack thereof would affect the outcome of her father's trial." Unpub. op. at 6.

[5] Mil.R.Evid. 804(b)(5) provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

5. *Other exceptions.*

*A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trust-*

Appendix. There are no issues before us pertaining to the correctness of the parties' understanding of German law as it may have applied to the victim or to the military judge's handling of these matters; and we do not decide them.

## II

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

As the Supreme Court has consistently pointed out:

[I]t is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte*

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*worthiness,* if the military judge determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative of the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Emphasis added.)

Mil.R.Evid. 803(24) (availability of declarant as witness immaterial) is virtually identical. The military judge selected Mil.R.Evid. 804(b)(5) due to its technical definition of " 'Unavailability as a witness,' includ[ing] situations in which the declarant . . . persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so." *See* Mil.R.Evid. 804(a)(2).

> affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States,* 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895).

*California v. Green,* 399 U.S. 149, 157-58, 90 S.Ct. 1930, 1934-35, 26 L.Ed.2d 489 (1970).

Accordingly, the Supreme Court has stressed the primacy of the need to produce the witness at the trial, if at all possible. *Barber v. Page,* 390 U.S. 719, 723, 88 S.Ct. 1318, 1321, 20 L.Ed.2d 255 (1968) (error to admit transcript of witness' prior testimony, where witness in federal prison in adjoining state and state made "no effort" to produce him at trial); *cf. Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Production of the witness solves a myriad of problems. Even though the witness cannot be subject to cross-examination at the point the hearsay statement is made, that fact

> cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time of the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story. . . .

*California v. Green,* 399 U.S. at 159, 90 S.Ct. at 1935-36. *Cf. United States v. Yeauger,* 27 MJ 199, 202 (CMA 1988), *cert. denied,* 490 U.S. 1005, 109 S.Ct. 1638, 104 L.Ed.2d 154 (1989). The *Green* Court, in a case wherein the hearsay declarant was "markedly evasive and uncooperative on the stand," concluded that

> the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.

*Id.* 399 U.S. at 151 and 158, 90 S.Ct. at 1931 and 1935.

In *Delaware v. Fensterer,* 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985), a government expert had reached an incriminating conclusion regarding a piece of evidence (a strand of hair), but he could not, at trial, remember which of three possibilities led him to that ultimate conclusion. Fensterer complained that he could not effectively cross-examine, and thus discredit, the expert with respect to his conclusion. The Supreme Court held that Fensterer was not denied confrontation, noting:

> "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination." Id.* [*Davis v. Alaska,* 415 U.S. 308,] at 315-16 [94 S.Ct. 1105, at 1109-10, 39 L.Ed.2d 347] [(1974)] (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . .

474 U.S. at 19-20, 106 S.Ct. at 294-95. Fensterer's cross-examination of the expert, including "demonstrat[ing] to the jury that . . . [the expert] could not even recall the theory on which his opinion was based," was held suffi-

cient to satisfy the Confrontation Clause. *Id.* at 20, 106 S.Ct. at 295.

In *United States v. Owens,* 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988), an assault victim made an out-of-court identification of the defendant as his assailant less than a month after the assault. By the time of trial, the victim could remember having identified Owens as his assailant (near a month after the attack). However, as a result of the grievous head injuries he suffered in the assault, he could no longer remember having seen his assailant, or indeed any of his numerous visitors, except one (not the accused) while he was in the hospital. The Supreme Court permitted receipt of the out-of-court identification, even though cross-examination was impossible. Quoting from *Fensterer* the Court reiterated that it was the "*opportunity* for effective cross-examination" that was guaranteed by the Confrontation Clause.[6] Even if the victim had no memory, the opportunity guaranteed by the Constitution was offered. "It is sufficient," said Justice Scalia for the Court, "that the defendant has the opportunity to bring out such matters as . . . the very fact that he [the witness] has a bad memory." 484 U.S. at 559, 108 S.Ct. at 842.

We likewise have long insisted that the hearsay declarant be produced whenever possible. *United States v. Miller,* 7 USCMA 23, 30, 21 CMR 149, 156 (1956) (two perfunctory phone calls on even before trial insufficient

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[6] Nothing in the Supreme Court's cases supports Chief Judge Sullivan's radical view, 39 MJ at 170, that an accused's mere sense of shifting tactical advantage is all that it takes to override the Supreme Court's opportunity-to-cross-examine benchmark, such that the accused can, on impulse, now decline to cross-examine a tendered witness, or now resurrect the denial-of-confrontation shield, according to his maximal level of comfort at the moment. The accused either has an opportunity to cross-examine at trial, or he does not. Whether he chooses to exercise it is his business.

effort to locate prosecution witness; deposition not admissible); *United States v. Gaines,* 20 USCMA 557, 561-62, 43 CMR 397, 401-02 (1971) (error to receive deposition of prosecution witness, absent showing of actual unavailability, where Government procured witness' departure from country (Viet Nam) and effected his discharge from active duty prior to expiration of his enlistment).

In *United States v. Barror,* 23 MJ 370, 372-73 (CMA 1987), we admonished government counsel generally as follows:

> When difficulties or inconveniences arise in obtaining the witnesses, or when it appears that they may be "softening" in their position, there may be a certain human tendency—or at least the appearance of one—for prosecutors to relax somewhat their efforts to obtain the witnesses—if they already have admissible accusatory statements in hand. For this reason, we have been quite insistent that all reasonable means of obtaining crucial witnesses' presence be undertaken before we will consider approving substitutes. *See, e.g., United States v. Cokely,* 22 MJ 225 (CMA 1986); *United States v. Hinton,* 21 MJ 267 (CMA 1986).

(Footnote omitted.)

III

In the instant case, the Government did not seek to rely on paper evidence, but rather produced the witness. It is true, of course, that the victim was not subjected to "full and effective cross-examination," *California v. Green,* 399 U.S. at 159, 90 S.Ct. at 1935-36; but then the defense waived cross-examination. Indeed it is clear that examination of the victim, direct or cross, was the very last thing

on earth the defense wanted to have happen. Having thus eschewed confrontation, appellant cannot now claim a denial of it. *See United States v. Hines,* 23 MJ 125, 132 (CMA 1986); *cf. United States v. Thevis,* 665 F.2d 616, 632-33 (5th Cir.) (waiver of right to confrontation is "a fortiori" waiver of right to raise hearsay objection), *cert. denied,* 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982). As a result of appellant's waiver of cross-examination, we hold that he was not denied his rights under the Confrontation Clause.

**IV**

The question remains:

> What of the victim's pretrial statements received in evidence under Mil.R.Evid. 804(b)(5)?[7] The military judge's extensive findings in that regard, after a lengthy evidentiary hearing into the circumstances surrounding the statements, are attached hereto. *See* Appendix. Generally, these findings address the circumstances surrounding the taking of the statements. In at least two respects, however, the judge made reference to corroborating matters as supporting his conclusions of reliability. One such corroborating matter was the seizure from appellant's belongings of a particular pornographic video described by the victim as having been repeatedly shown to her by appellant. The other—and most significant—corroborating factor was appellant's confession to the very conduct described in the victim's pretrial statements. We now consider whether it was proper to consider such corroboration.

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[7] *See* n. 5, *supra.*

In *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), the Supreme Court concluded that a particular hearsay statement was improperly received in evidence because the trial judge had relied in part on independent evidence corroborating the declarant's statement. 497 U.S. 817-26, 110 S.Ct. at 3148-51, 3153. Appellant contends that *Wright* bars receipt of A's pretrial statements due to the military judge's referrence to corroborating evidence. We disagree.

In *Wright,* the Supreme Court neatly encapsulated its previously developed approach to confrontation-hearsay analysis when it stated:

> In *Ohio v. Roberts,* [448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980),] we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. 448 U.S., at 65, 100 S.Ct. at 2538. We noted that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay." *Ibid.* "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant, whose statement it wishes to use against the defendant." *Ibid.* (citations omitted.) Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66, 100 S.Ct. at 2539 (foot-

> note omitted); *see also Mancusi v. Stubbs,* 408 U.S. 204, 213, 92 S.Ct. 2308, 2313, 33 L.Ed.2d 293 (1972).

497 U.S. at 814-15, 110 S.Ct. at 3146.

*Wright,* however, was a very different case from the instant one. There, the trial judge conducted a voir dire examination of the victim, 3 years old at the time of trial, and concluded she was "not capable of communicating to the jury." The parties agreed. 497 U.S. at 809, 110 S.Ct. at 3143. Live confrontation of the hearsay declarant was neither formally tendered, as here, nor waived, as here. In the *Wright* circumstances, with the infant not able to testify, the Supreme Court went forward to apply the *Roberts* confrontation analysis *to the proffered hearsay evidence itself* (*i.e.,* the testimony of an examining physician relating the victim's statements to him, offered under Idaho's residual hearsay exception).

In the course of that application, the Supreme Court concluded that

> "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, but *we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.*

497 U.S. at 819, 110 S.Ct. at 3148 (emphasis added). For purposes of the Confrontation Clause, in other words, the fact that the 3-year-old's statement was corroborated by other evidence could not be used to bootstrap its trustworthiness. 497 U.S. at 823, at 110 S.Ct. at 3150.

The *Wright* majority "derive[d]" the foregoing noncorroboration conclusion

> from the rationale for permitting exceptions to the general rule against hearsay:

> "The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath can best be brought to light and exposed, if they exist, *by the test of cross-examination*. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 J. Wigmore, *Evidence* § 1420, p. 251 (J. Chadbourne rev. 1974).

In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that *the test of cross-examination* would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial.

497 U.S. at 819-20, 110 S.Ct. at 3148-49 (emphasis added).

By its terms, however, the Wigmore comment, like *Wright* itself, plainly relates to circumstances wherein the opportunity for *cross-examination* has been neither provided or waived. Accordingly, we do not read *Wright* as a blanket assertion that, even in cases where confrontation has been actually provided or waived, hearsay evidence offered under a rule of evidence must itself satisfy Sixth Amendment – *Roberts* confrontation analysis prior to admission. In particular, we see no suggestion in *Wright* that, in such cases, the Sixth Amendment forbids reference to corroborating evidence for a determination of "equivalent circumstantial guarantees of trustworthiness" under the "residual hearsay" evidentiary rules.

Furthermore we would not expect the Confrontation Clause to be so applied to a pure rule-of-evidence question. The military "residual hearsay" rules, after all, are but verbatim copies of their Federal Rules of Evidence

counterparts, Fed.R.Evid. 803(24) and 804(b)(5), which rules are applicable to federal civil and criminal cases alike. Since the Confrontation Clause does not apply to civil cases at all, we do not read *Wright* as purporting to engraft Confrontation Clause requirements onto hearsay rules of evidence generally. *Cf. Amcast Industrial Corp. v. Detrex Corp.*, 779 F.Supp. 1519, 1527-28 (N.D.Ind. 1991) (motion for summary judgment based on plaintiff's reliance on hearsay to support complaint in action under Comprehensive Environmental Response, Compensation, and Liability Act, as amended 42 USC §§ 9601 *et seq.*:

> "Among the factors considered in determining whether to apply the residual exception are . . . the existence of sufficient corroborative evidence.").

In criminal cases where the confrontation opportunity was provided—*California v. Green, supra,* for example, where the witness was "markedly evasive and uncooperative on the stand"—the declarant's prior statement itself was not subjected to a separate confrontation analysis. 399 U.S. at 168-69, 90 S.Ct. at 1940-41. In *United States v. Owens, supra,* where the victim-witness could not remember seeing his assailant, yet the opportunity for confrontation was provided, the victim's prior identification of the defendant as his assailant was received without independent constitutional scrutiny. 484 U.S. at 564, 108 S.Ct. at 845.

This is not surprising, since the Supreme Court has often reminded us that the Confrontation Clause and the hearsay exceptions are not co-extensive:

> It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.

*Dutton v. Evans,* 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970) (footnotes omitted).

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. . . .

*California v. Green,* 399 U.S. at 155, 90 S.Ct. at 1933.

Thus we do not apply the prohibition against bolstering "indicia of reliability" under Sixth Amendment – *Roberts* analysis to the "equivalent circumstantial guarantees of trustworthiness" requirement of residual hearsay under the rules of evidence. The Supreme Court has not yet definitively ruled on whether corroboration is one of the circumstances which may be used to assure the trustworthiness of hearsay under the rules of evidence, and the lower courts and the commentators have taken a variety of positions. *Compare* Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence,* 15 San Diego L.Rev. 239 (1978), and the cases cited therein, *with* Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule,* 57 N.Y.U.L.Rev. 867 (1982), and the cases cited therein.[8]

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[8] Professor Imwinkelreid and others have also commented on the mixed quality of some evidence that is routinely received under the traditional common-law hearsay exceptions:

> As noted by Professor Davis, with whom other commentators have concurred, one of the most irrational features of hearsay

law is that "technically incompetent hearsay is often more reliable than technically competent evidence.". . .

* * *

Rather than ensuring extraordinary reliability, the traditional exceptions permit the admission of hearsay of frankly dubious reliability. In Professor McCormick's terse words, they sanction the admission of "[m]uch worthless evidence." In the case of some exceptions, the guarantee of trustworthiness seems "imagined" rather than real. On occasion, the common law seemed content with any guarantee other than the mere fact that the statement had been made.

Professor Morgan was one of the first to expose the suspect nature of some of the evidence routinely admitted under the traditional exceptions. For example, he pointed out that the continuity of state of mind theory overlooks probative memory dangers. Modern witness psychology has validated Morgan's criticism. This discipline has provided new insights which confirm the high probability of error in such frequently admitted types of hearsay as excited uterrances.

The primary explanation for the relatively low quality and reliability of traditionally admitted hearsay is the common law's obsession with perjury. There are four distinct probative dangers—perception, memory, narration, and sincerity. Nevertheless, the common law courts, in framing the exceptions, focused primarily on sincerity. For most exceptions, there is no real substitute for a cross-examiner's ability to probe errors in perception, memory, or narration; realistically, there is only a substitute for the oath—some circumstantial inference that the declarant is not consciously lying. The hoary exceptions for dying declarations, declarations against interest, and excited utterances illustrate that the courts have placed the greatest emphasis on the testimonial quality of sincerity in evolving the traditional exceptions.

Imwinkelried, *The scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence,* 15 San Diego L.Rev. 239, 262-63 (1978) (footnotes omitted).

The instant case embodies a major improvement over "traditional hearsay exception" practice and, to a considerable extent, ameliorates the common-law concern about the sincerity of the declarant. Since the declarant was on the witness stand at the court-martial explaining her reasons for refusing to testify (revealing in the process significant details and ratifying, in effect, her prior statements), the factfinder—

We have previously sided with those courts holding that corroboration by other evidence is one of the means by which hearsay evidence can be tested for trustworthiness.[9] *United States v. Hines,* 23 MJ at 138[10]; *United States v.*

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here the military judge—was presented with an eye and earful with which to evaluate her sincerity, motivations, and credibility. An opportunity to so observe the declarant-witness will often enhance greatly a factfinder's ability to weight prior statements. *Cf. California v. Green,* 399 U.S. 149, 159, 90 S.Ct. 1930, 1935-36, 26 L.Ed.2d 489 (1970).

[9] Prior to *Wright,* virtually all of the United States Courts of Appeals had cited corroboration as a factor appropriate to reliability analysis. *See* Comment, *Idaho v. Wright*:

> Is it a Step in the Wrong Direction Determining the Reliability of Hearsay Statements for the Confrontation Clause? 53 Ohio St.L.J. 663, 666-71 (1992) (discussing cases).

[10] Regarding the Chief Judge's comment that, in *United States v. Hines,* 23 M.J. 125, 134 (CMA 1986), we "constitutionalized Mil.R.Evid. 804(b)(5)," 39 MJ at 171; that statement is taken completely out of context. *Hines* was decided almost 4 years before *Idaho v. Wright, supra,* and nothing in *Hines* could possibly be construed as addressing the question of what pieces of evidence might be used to ascertain reliability. The quoted portion of *Hines* clearly was focusing on *how reliable* evidence had to be in order to be admissible under the residual hearsay exception—and our answer was that it had to be every bit as reliable as did evidence receivable in lieu of confrontation under the Sixth Amendment. As to this requirement, we have certainly not backed off one iota.

If my *Hines* text, in retrospect of *Wright,* is at all ambiguous on that point, I would invite the reader to examine the *substance* of the cases I cited (23 MJ at 134). These cases were cited in support of our conclusion that reliability must be very high indeed to satisfy the residual hearsay exceptions. *I.e., United States v. Nick,* 604 F.2d 1199, 1203 (9th Cir. 1979) ("The question in each case [confrontation/hearsay] must be whether a particular hearsay declaration, otherwise admissible, has such great probative value as evidence of a material fact and such a high degree of trustworthiness under all of the circumstances that its reception outweighs any risk to a defendant that unreliable

*Yeauger*, 27 MJ at 202; *see also United States v. Jones*, 30 MJ 127, 131 (CMA 1990) (Cox, J., concurring) ("Like all hearsay exceptions, this [Mil.R.Evid. 803(24)] is a rule of reliability, truthfulness, trustworthiness, and accuracy."). Pending clarification to the contrary by the Supreme Court, we adhere to that view.

Under the circumstances of this case, *see* Appendix, we hold that the military judge did not abuse his discretion in considering corroborating evidence, including appellant's confession, in determining that the victim's pretrial statements satisfied the residual hearsay requirements of Mil.R.Evid. 804(b)(5).

The decision of the United States Air Force Court of Military Review is affirmed.

Judges CRAWFORD and GIERKE concur.

**APPENDIX**

The ruling of the military judge on the defense objection to admission of the victim's pretrial statements (Pros.Ex. 4 and 5) was as follows:

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evidence may be received against him. . . ."); *United States v. West*, 574 F.2d 1131, 1138 (4th Cir. 1978) ("All of this [reciting the evidence corroborating the hearsay] lends a high degree of reliability and trustworthiness to Brown's testimony before the grand jury. . . . It should not be surprising that the same circumstances suffice to meet the requirements of § 804(b)(5) and of the Confrontation Clause.").

Certainly I was not purporting in *Hines* to prophesy subsequent rulings regarding the *types* of evidence that might be used to establish reliability, for either Sxith Amendment or hearsay purposes; I was also not asserting that the residual hearsay evidentiary rule must be welded to the Confrontation Clause for all purposes, procedural as well as substantive, for all time. As the instant case does not, in my judgment, involve a Sixth Amendment component, the unaffected portion of the *Hines* opinion is very much apposite to the instant facts. I regard this opinion as an *application* of the viable portions of *Hines*, not an overruling of them.

> The court rules that the victim's out of court statements, Prosecution Exhibits 4 and 5 for Identification, are admitted under M.R.E. [Mil.R.Evid.] 804(b)(5). In arriving at this ruling, the court has determined that the statements by the victim were made by the victim, . . . [A]; second, that the statements are offered as evidence of material facts in this case; that is, evidence of the sexual misconduct alleged in the charges and the specifications. The court has determined that the statements are more probative on the issues of whether any sexual misconduct occurred than any other evidence which the Government could reasonably procure through reasonable means. In fact, considering the refusal of the victim to testify in this case, the statements are the only form in which the victim's allegations can be presented to the court.
>
> The court has also determined that the general purpose of the Military Rules of Evidence and the interests of justice will be served by admission of the victim's statements into evidence. Again, this case involves an intra-family alleged criminal offenses [sic] where really the only evidence in this particular case, substantial evidence, is from the family members themselves, one of which who [sic] has been deemed unavailable; this is, the victim.

The court also finds that the statements of . . . [A] have the following equivalent circumstantial guarantees of trustworthiness:

> First, the victim had no apparent motive to lie; second, both statements are typed, easily readable, are coherent and, more importantly, are signed under oath by the victim. Next, the victim, in her brief appearance on the stand yesterday, acknowledged that

she had been under oath, placed under oath in June of '89, and that she had never lied when under oath. Next, that the victim's motivations in revealing the alleged sexual misconduct against her on 9 June '89 is reflected in her 20 June '89 statement, wherein she states that for several days prior to 9 June '89 she feared that her father was going to have actual sexual intercourse with her and that she felt it was necessary to report his conduct to Mrs. Harris. Furthermore, . . . [A] was afraid that her father might be doing something similar to her sister, and again, appears to be her motivations for revealing the alleged misconduct.

Next, the victim has not recanted her statements. On the stand yesterday, she expressed her desire simply not to be involved and declined in fact the opportunity to recant. The court really does not give much weight to her statement allegedly overheard yesterday by Sergeant McQuiston [(the Area Defense Counsel Administrator; the statement overheard was made by the victim to civilian defense counsel just before the court-martial commenced)] that her 20 June statement is five percent untrue. That statement really in itself is very unclear as to what she means. There is an indication she'd only read two lines of the statement and then made that particular statement and the court just does not place virtually any weight on that particular statement considering that [sic] the victim's now reluctance to participate in these proceedings or to hurt her father in any way.

The court also considers the details of the conduct of the interviews, which affirms the accuracy and the voluntary nature of the victim's statements. On the 9th of June, the victim, when she was being inter-

viewed, was not overly emotional or confused or distraught, but was coherent. She readily told her story, once she was allowed to be just with women, to then Lieutenant Hall. Lieutenant Hall did not pressure the victim or put words in her mouth or coerce her in any way. Lieutenant Hall typed the statement using lan guage obtained directly from the victim. The victim had the opportunity to change or correct her statement. Thus, the 9 June '89 statement is substantially the victim's own recitation, own words of the allegation.

On 20 June '89, again the victim initiated the interview with Special Agent Sallinger. The victim was coherent, under control. She again was not pressured or forced into giving the statement or a statement in any particular form. She was given the opportunity to change and correct her statement. Her words again were given directly to Special Agent Sallinger, who typed them up on the computer as she gave them to him.

The court also finds as circumstantial evidence of trustworthiness, that both statements are detailed. They're not inherently inconsistent or unbelievable, and they appear to be couched in language and terminology of that used by a young teenager. The court also relies on the fact that some of the misconduct, some of apparently the touching and the feeling, occurred just several days before she reported it, and the other misconduct, again, within a reasonable period of time where she was likely to recall the details of that misconduct.

The court finds that the victim's refusal to testify also affirms the accuracy of her statements, since she

recognized from the stand that if she testified and told the truth, that her father would go to jail. It certainly indicates to the court that her reflecting back on her statements that she realizes that there's something in that statement which is true, which is harmful to her father.

In response to the court's question about the charges themselves, she did answer that they were too heavy, or words to that effect, but she did not say that the allegations which led to those charges were untrue.

The court also relies on the fact that the accused confessed to much of the sexual misconduct in his 9 June '89 statement to the OSI, Prosecution Exhibit 2 for Identification; that is, he confessed to the fondling of his daughter's breasts and vaginal area, to having her fondle his penis, confessed to performing oral sodomy on her on a number of occasions, to rubbing his penis on her vagina. Again, his confession substantially supports her statements as to the times and places indicated by the victim and as to the activity which allegedly occurred.

In her 20 June '89 statement, the victim stated that the accused had made her watch dirty movies, one of which was entitled, "Between the Sheets." Numerous purported pornographic video tapes were seized from the accused's home, including one called "Between the Sheets."

Finally, in assessing the victim's character for truthfulness, the court has received differing opinions from several different witnesses—Sergeant Terrell, Captain Friesen, Sergeant Gardiner. However, I do not find the opinions as to her lack of trustworthiness so persuasive as to discount the victim's credibility as it relates to her 9 and 20 June statements.

SULLIVAN, Chief Judge (dissenting):

The granted issue in this case is:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ADMITTING INTO EVIDENCE APPELLANT'S 9 JUNE 1989 STATEMENT AND THE 9 JUNE 1989 AND 20 JUNE 1989 STATEMENTS PURPORTEDLY GIVEN TO AGENTS OF THE AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS BY THE PUTATIVE VICTIM.

The out-of-court statements of A.M. clearly establish that appellant sexually abused her as charged and as he himself confessed prior to trial. However, this evidence was also essential corroboration for appellant's confession, and its exclusion might also render inadmissible appellant's confession. Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984. Appellant argues that the alleged-victim's pretrial statements were admitted at his trial in violation of the Confrontation Clause of the Sixth Amendment and Mil.R.Evid. 804(b)(5).

## I

### Constitutional Question

The majority opinion first holds: "It is true, of course, that the victim was not subjected to 'full and effective cross-examination,' *California v. Green,* 399 U.S. at 159, 90 S.Ct. 1935-36." 39 MJ at 163. I agree. In *United States v. Owens,* 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988), the Supreme Court generally said:

> The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." This has long been read as securing *an adequate opportunity to cross-examine*

> *adverse witnesses. See, e.g., Mattox v. United States,* 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895); *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). . . .

484 U.S. at 557, 108 S.Ct. at 841 (emphasis added). Here A.M. appeared at trial but refused to answer any questions about the charged offenses or her prior statements about the charged offenses. Unlike the situation of the forgetful witness in *United States v. Owens, supra,* A.M. cannot be said to be "a hearsay declarant [who] is present at trial *and subject to unrestricted* cross-examination." *Id.* at 560, 108 S.Ct. at 843 (emphasis added).

Nevertheless, the majority opinion further concludes that appellant "waived cross-examination," 39 MJ at 163, and it is this conclusion with which I must respectfully disagree. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). For this holding, the opinion relies on the decision of *United States v. Thevis,* 665 F.2d 616 (5th Cir.), *cert. denied,* 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982). There, *clear and convincing evidence* was presented that the defendant murdered the very witness whose grand-jury statements the prosecution sought to introduce. The Fifth Circuit held

> that a defendant *who causes a witness to be unavailable* for trial for the purpose of preventing that witness from testifying also waives his right to confrontation under the *Zerbst* standard. A defendant who undertakes this conduct realizes that the witness is no longer available and cannot be cross-examined. Hence, in such a situation the defendant has intelligently and knowingly waived his confrontation rights.

665 F.2d at 630 (emphasis added). In *United States v. Hines,* 23 MJ 125, 133 (CMA 1986), this Court held that it would not find such a waiver in the "absen[ce of] a specific factual finding that . . . [the witness] was being controlled by appellant." No such finding was reached by the judge in this case, and indeed no clear and convincing evidence was presented in this case that appellant caused the witness not to testify at this court-martial.

The majority opinion finally suggests that appellant made a tactical decision not to cross-examine A.M., and thus no Constitutional violation occurred. 39 MJ at 163. First, I note that it is clear from this record that defense counsel did not want the alleged victim to testify in this case or have her pretrial statements admitted. What defense counsel would? Nevertheless, it is not clear that defense counsel did not want to cross-examine this witness if her damaging pretrial statements were admitted. What defense counsel wouldn't? In any event, there is case law that holds that "[t]he right to confrontation is not" violated "if a defendant for tactical reasons chooses to forego cross-examination." *See United States v. Figueroa,* 976 F.2d 1446, 1457 (1st Cir. 1992). However, in appellant's case, defense counsel declined to cross-examine A.M. before the military judge ruled that her pretrial statements were admissible and after she unequivocally stated that she would answer no questions about her prior statements. I cannot find that the Sixth Amendment was satisfied under this theory.

My rejection of the majority approach to the Constitutional issue does not dictate that appellant was *per se* denied his right to confrontation in this case. I note, however, that appellant did assert at trial that admission of this hearsay evidence would violate his right to confrontation under the Sixth Amendment. *See generally United States v. Owens,* 484 U.S. at 558-61, 108 S.Ct. at 842-43.

However, the military judge, in ruling on the trustworthiness question, did consider the independent corroboration of appellant's confession. That was Constitutional error under *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139 (1990).

II

**Evidentiary Question**

The majority opinion, finding no Constitutional violation, proceeds to decide that the military judge and Court of Military Review did not err in admitting this hearsay evidence under Mil.R.Evid. 804(b)(5). Although I need not reach that question, I again must respectfully disagree. Evidence corroborating the truth of matters asserted in the hearsay statements may not be considered in finding the "equivalent circumstantial guarantees of trustworthiness" required by this evidentiary rule.

My basis for this conclusion is the following language of Mil.R.Evid. 804(b)(5):

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former testimony.* Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article

32 is admissible under this subdivision if such a record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

(2) *Statement under belief of impending death.* In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness,* if the military judge determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative of the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Emphasis added.)

Three reasons exist for my construction of Mil.R.Evid. 804(b)(5) as prohibiting consideration of independent corroborative evidence of the matter asserted in the hearsay statements. First, *Idaho v. Wright, supra,* holds that such corroborative evidence is not a matter relevant to the trustworthiness of a statement but rather to the lack of prejudice in its admission. 497 U.S. at 823, 110 S.Ct. at 3150-51; *see United States v. Ellis,* 935 F.2d 835-95 (1st Cir. 1991). Second, the Supreme Court in *Idaho v. Wright, supra,* expressly defined "particularized guarantees of trustworthiness" in light of Fed.R.Evid. 804(b)(5) and concluded that only the "circumstances . . . surround[ing] the making of the statement" could be considered. 497 U.S. at 820, 110 S.Ct. at 3149. *See United States v. Grooms,* 978 F.2d 425, 427 (8th Cir. 1992); *United States v. Accetturo,* 966 F.2d 631, 636 (11th Cir.

1992). Finally, this Court generally constitutionalized Mil.R.Evid. 804(b)(5) in *United States v. Hines,* 23 MJ at 134; therefore, the holding of *Idaho v. Wright, supra,* constitutionally prohibiting consideration of independent corroborative evidence logically should be applicable.

Despite all of the above, I would not set aside appellant's conviction. Even cursory review of the military judge's findings reveals that appellant's confession was one of many reasons that he found A.M.'s pretrial statements were trustworthy within the meaning of Mil.R.Evid. 804(b)(5). I also note that this case was tried before the decision of the Supreme Court in *Idaho v. Wright, supra,* and in light of this Court's decisions prior to *Idaho v. Wright, supra,* which permitted consideration of independent corroborating evidence on the trustworthiness question. Therefore, I would remand this case to the trial court for reconsideration of this issue in light of *Idaho v. Wright, supra,* and *United States v. Greer,* 33 MJ 426 (CMA 1991).

WISS, Judge (dissenting):

I join fully in the dissenting opinion of the Chief Judge. Pursuant to his rationale, I agree that appellant did not waive his Sixth Amendment confrontation and cross-examination rights, so appellant's reliance upon those rights remains viable. The Government's responsibility in this context, then, was either to produce the witness (which assumes her availability) or to demonstrate her unavailability. *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *relied upon in United States v. Clark,* 35 MJ 98, 104 (CMA 1992).

A number of interesting questions suggest themselves within the issue of whether the witness was available or unavailable, *see, e.g., United States v. Ortiz,* 35 MJ 391

(CMA 1992); *United States v. Clark, supra.* The determinative impact of the question of her availability, however, is rendered moot under these facts by my agreement with the Chief Judge that the showing of reliability that is necessary under the evidentiary hearsay rules is the same as will satisfy the Confrontation Clause when the witness is unavailable. *United States v. Hines,* 23 MJ 125 (CMA 1986); *see United States v. Clark, supra* (where appellant waived confrontation rights, Court applied constitutional reliability standard in determining whether residual hearsay rule was met).

In addition to the rationale offered by the Chief Judge on the appropriate reading of Mil.R.Evid. 804(b)(5)—and, as well, Mil.R.Evid. 803(24), which is the residual-hearsay exception applicable when the declarant is available and is worded precisely the same as is Mil.R.Evid. 804(b)(5)—I suggest that a fair reading of the rules themselves ineluctably leads to the same conclusion. Each of these hearsay exceptions applies to an out-of-court "statement not specifically covered by any of the foregoing [specific] exceptions but having equivalent circumstantial guarantees of trustworthiness." It seems clear to me that the "equivalent" guarantees, thus, are those that are found within the "foregoing [specific] exceptions." Perusal of those exceptions—Mil.R.Evid. 803(1)-(23) and Mil.R.Evid. 804(b)(1)-(4)—reveals that, in every instance, the basis for reliability of the out-of-court statement is some circumstance that immediately and directly surrounds the making of the statement itself, not some collateral circumstance.

Finally, I agree with the Chief Judge that the appropriate disposition of this case, in light of our reasoning, is to remand for reconsideration. The military judge obviously relied to some extent upon the circumstances surrounding

the making of the witness' out-of-court statement; it is equally obvious, though, that he relied to some extent upon impermissible collateral factors—one of which was a potentially powerful one, appellant's confession. Under these circumstances, it is appropriate to return this case to the trial level for a proper reliability analysis.

**APPENDIX B**

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

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ACM 28358

UNITED STATES

*v.*

TECHNICAL SERGEANT ALVA Z. MCGRATH, FR541-70-7702
UNITED STATES AIR FORCE

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11 May 1992

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Sentence adjudged 17 November 1989 by GCM convened at Hahn Air Base, Federal Republic of Germany. Military Judge: Dennis L. Olson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for *120 months,* and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair, Colonel Jeffrey R. Owens, Major Ronald G. Morgan, and Captain Michael D. Burt.

Appellate Counsel for the United States: Colonel Robert E. Giovagnoni, Major Paul H. Blackwell, Jr., and Major Leonard R. Rippey.

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Before

HODGSON, MCLAUTHLIN, and JAMES
Appellate Military Judges

## OPINION OF THE COURT

HODGSON, Senior Judge:

In a bench trial, Technical Sergeant McGrath was convicted of carnal knowledge, sodomy, and indecent acts with his 14-year-old daughter. He was sentenced to a dishonorable discharge, 10 years confinement, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal he argues that the trial judge erred in admitting the out-of-court statements of his daughter; there is insufficient evidence to support a carnal knowledge conviction; his request for a defense witness was improperly denied; the sentence is inappropriately severe. Because we grant some relief, some discussion of the assigned errors is warranted.

## FACTS

On 9 June 1989, the appellant's daughter, Aileen,[1] told her school counselor "that something had been going on and could she tell her about it." She then made an allegation of sexual abuse by the appellant, her natural father. The counselor notified the staff psychologist at the Hahn Hospital Mental Health Clinic, the Office of Special Investigations (OSI), and the base legal office.

Initially, Aileen met with Doctor Timothy Friesen, the staff psychologist, Special Agent Ken Sallinger of the OSI, and Captain Deborah Hall, an attorney from the base legal office with extensive experience in child abuse cases. Sergeant Donitta Gardiner, who is assigned to the Mental Health Clinic, and Leann Steinbach, a German employed in the OSI office, were also present. Aileen was first questioned by Agent Sallinger, but when she became uncom-

[1] This is not the girl's real name.

fortable discussing the specific acts in front of the men present, they left and Captain Hall obtained a more detailed account of what Aileen's father had done. Captain Hall's method of interviewing Aileen was to ask her to describe an incident, obtain the details, and then inquire if anything else happened. The procedure was repeated for each revealed incident. Aileen was not crying, but she "appeared embarrassed and slightly upset."

Later, Aileen, Captain Hall, and Special Agent Sallinger went to the OSI office where Hall and Aileen reduced Aileen's oral statements to writing. It took approximately an hour to produce the sworn written statement that Aileen signed. A little over a week later, on 20 June, Aileen contacted Agent Sallinger and said she had some more information. This disclosure was also reduced to a sworn written statement after an interview that lasted approximately one hour.

These two statements disclosed the following. Aileen arrived at Hahn Air Base, Germany shortly before Thanksgiving Day, 1987. In January 1988, the appellant asked Aileen if she wanted to watch "dirty movies" with him. She saw these movies about three times between January and April 1988. They would watch them at night when the appellant's wife was at work. She remembers one of the movies was entitled "Between the Sheets" and was about a mattress and brass bed talking about sexual encounters occurring on the bed over a 200-year period. The film itself graphically depicts men and women engaged in various forms of sexual relations.

About 15 April 1989, the appellant took Aileen into the bedroom and told her to get undressed. He got undressed and the two sat on the bed naked. He then began to caress her vagina and clitoris, which he refer to as the "tickle button." In this same general time frame the appellant asked Aileen when he "could have her." When she suggested 16

he indicated she "would be a non-virgin by then." Her alternative suggestion of 15 was swept aside because "he couldn't wait that long." He finally agreed to wait until she was 14.

In the later part of April 1989, the appellant again took his daughter to her room and undressed her, he got undressed himself. He began kissing her mouth and breasts and subsequently began to kiss and lick her vagina. He then masturbated himself to orgasm. When she told him she did not think father and daughter should do this, he replied, "it was the only way he could get [her] through this so [she] can have a happy life."[2]

About the middle of May, the appellant again undressed himself and his daughter and laid down on the bed. He began by kissing her on the mouth and whispered in her ear, "I'm going to kiss you all over. I'm going to stick it all the way in." When she said no, he began to kiss her stomach, thighs and vagina. Later, he rubbed his erect penis on the outside of her vagina. There is scant evidence of penetration.

On Tuesday, 6 June, Aileen asked to borrow the appellant's baseball glove. He said she could if "he could have [her] tomorrow." The next day the appellant's wife stayed home. On Thursday, the appellant worked. On Friday, Aileen talked to the school counselor because she knew on Saturday the appellant "would try to take advantage of her."

After proper warnings, the appellant provided a statement on 9 June to law enforcement investigators. In this statement, the appellant admitted fondling his daughter's

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[2] In his statement to the OSI, the appellant implied that he knew that Aileen's step-father had sexually abused her and that this was his way of getting the incident out in the open and get "closer" to her as a father.

breasts and vaginal area on numerous occasions. He also admitted masturbating in her presence and performing cunnilingus on her. He acknowledged rubbing his erect penis on her vaginal area, but denied ever having sexual intercourse with her. He insisted that during these episodes he stopped whenever his daughter asked him to.

He maintained he had her undress because he "wanted to break down the physical barriers which might be keeping her from expressing her feelings." He claimed that his actions with his daughter were to show that "she [could] also derive pleasure from sexual encounters," and "she had been deprived of this while [her] step-father got his own satisfaction." The appellant's statement suggests that Aileen had been sexually abused by her step-father before she came to live with him. He stressed that his conduct with his daughter was to help her overcome her earlier sexual experiences.

A search of the appellant's house on 12 June disclosed video movies entitled "Between the Sheets" and "Taboo IV." Both movies contained explicit sexual encounters involving sexual intercourse, fellatio, and cunnilingus. The predominant theme of "Taboo IV" was the condonation of incestuous relationships, including ones between father and daughter.

**RESIDUAL HEARSAY EXCEPTION**

The appellant argues that the trial judge erred when he admitted Aileen's 9 and 20 June 1989 out-of-court statements under Mil. R. Evid. 804(b)(5). Appellate courts have consistently held that this rule is to be construed strictly and used in rare, exceptional circumstances. *See United States v. Yeauger,* 27 M.J. 199 (C.M.A. 1988). In military courts the residual hearsay exception finds its most frequent use in trials where children are victims of

alleged sexual abuse. It is unquestioned that society has a deep and compelling interest in protecting the welfare of its children. Accordingly, it would appear that Rule 804(b)(5) is well-suited to address the circumstance of family members who are witnesses to or victims of an intra-family offense. *See United States v. Arnold,* 18 M.J. 559 (A.C.M.R. 1984), *aff'd* 25 M.J. 129 (C.M.A. 1987).

Rule 804(b)(5) was taken without change from its federal counterpart. One of the necessary predicates for admitting a proposed statement is that it is more *probative* on the point than any other evidence the Government can muster through reasonable efforts. *See United States v. Fisher,* 28 M.J. 544 (A.F.C.M.R. 1989). Here, the daughter's out-of-court declarations were not only probative but "necessary" to the Government's case. *See United States v. Giambra,* 33 M.J. 331, 335 (C.M.A. 1991).

For out-of-court statements to be admissible under Rule 804(b)(5) two conditions must be met: 1) the witness is not available; and 2) the statement has adequate indicia of reliability. *See United States v. Taggart,* 944 F.2d 837 (11th Cir. 1991).

Appellate defense counsel initially claim the trial judge erred when he determined that Aileen was "unavailable" since she appeared as a witness at trial. To place this claim in context, it is necessary to examine Aileen's testimony in some detail.

Aileen was the prosecution's opening witness. After being sworn she testified that she was 14 years old and had lived with the appellant from the time she was 12 until June 1989 at which time she was placed in a foster home. However, just before trial she returned home to live with her mother, two brothers and sister—while the appellant moved to an on-base dormitory.

When asked to relate what happened between herself and her father, she replied, "I refuse to answer that ques-

tion." When pressed by the trial counsel and the judge, she indicated she had no intention of testifying against her father because she did not want to hurt her family or him. However, when given the opportunity to retract the statements accusing her father of sexual abuse, she refused to do so. She stated repeatedly during her time on the witness stand that she would not testify against the appellant "because I don't want my dad to go to jail." She also stated that perhaps he had been punished enough, " 'cause he knows if he tries it again, it would be a whole lot worse." In refusing to testify she stated:

> I have been told that, but they haven't said well, your father is going to jail if you testify, and he's not going to jail if you don't testify and all—but they gave me like an idea like—if you testify, there may be enough evidence to put your father in jail, and if you don't testify, there may not be enough to end up putting your father in jail, and I got the idea that I don't want to testify. I don't want my father in jail.

Throughout the trial judge's questioning, Aileen was adamant in her refusal to testify. When given the opportunity to cross-examine Aileen, trial defense counsel specifically declined to do so.

Appellate defense counsel urge that the trial judge did not seek alternative measures, for example by removing Aileen to the jurisdiction of a United States district court with authority to compel her testimony. In suggesting this remedy appellate counsel has not provided us with any authority that permits a military judge to *order* a civilian living in Germany to the United States for the purpose of accepting a subpoena. *Cf. United States v. Santiago-Davila,* 26 M.J. 380 (C.M.A. 1988) (no subpoena power exists to force an accused's wife to return to Germany from the United States for husband's court-martial).

Appellant also claims the trial judge's determination of Aileen's "unavailability" usurped his "right to confront and cross-examine his accuser." This assertion is somewhat ironic in that Aileen was on the witness stand and available for cross-examination which defense counsel pointedly declined to do, making it apparent that the *last* thing the appellant wanted was to question Aileen about the alleged offenses. The appellant, in essence, is attempting to use the confrontation clause "as a sword, not a shield." *See United States V. Hines,* 23 M.J. 125, 132 (C.M.A. 1986). Appellate defense counsel also maintain that the appellant is not responsible for Aileen's refusal to testify by his use of coercion, control, or influence. *See United States v. Barror,* 23 M.J. 370, 373 (C.M.A. 1987). Be that as it may, Aileen testified that *somebody* gave her a short course on the law of evidence and how her testimony or lack thereof would affect the outcome of her father's trial. *See generally United States v. Rousseau,* 21 M.J. 960 (A.C.M.R. 1986).

A witness who refuses to testify is unavailable for the purposes of Rule 804(b)(5). *See* Mil. R. Evid 804(a)(2). Here the witness, whose testimony was the heart of the Government's case, refused to relate that testimony. The record is clear that Aileen was steadfast in her refusal to give evidence she considered harmful to her father. In view of her relationship to the appellant and her reasons for not testifying, the trial judge was correct in taking her at her word that she would not testify, and finding her "unavailable" within the meaning of the residual hearsay exception. *See Jennings v. Maynard,* 946 F.2d 1502 (10th Cir. 1991); *see also United States v. Barror,* 20 M.J. 501, 502 n.1 (A.F.C.M.R. 1985), *rev'd on other grounds,* 23 M.J. 370 (C.M.A. 1987).

We must now decide if Aileen's out-of-court statements contain "adequate indicia of reliability" to justify their

admission in evidence. There is no litmus test for reliability of out-of-court statements. Each case must be evaluated on its own facts. *Barker v. Norris,* 761 F.2d 1396 (9th Cir. 1985). In *United States v. Bridges,* 24 M.J. 915, 917 (A.F.C.M.R. 1987), we acknowledged that the questioning techniques of the interviewer can introduce subtle biases that could make out-of-court statements suspect. *See also United States v. Hines, supra* and *United States v. Barror, supra.* Here, the record is devoid of any suggestion of improper questioning. Captain Hall, who was experienced in child abuse cases, testified how the interview was conducted. There is no indication she used suggestive or leading questions. If the defense thought otherwise, it could have questioned Aileen on the subject while she was testifying.

The voluntariness of the out-of-court statement is also an important consideration. *Barker v. Norris, supra.* Here, Aileen sought out a school counselor who referred the matter to the appropriate authorities. Her second statement was the result of her contacting the OSI, not the other way around. Further, there is no apparent motive for her to falsify her statements. *See State v. Larson,* 472 N.W.2d 120 (Minn. 1991). On the other hand, she stated logical reasons for refusing to testify against her father. *United States v. Ruffin,* 12 M.J. 952 (A.F.C.M.R. 1982), *pet. denied,* 13 M.J. 952 (C.M.A. 1989).

Like all hearsay exceptions, Mil. R. Evid. 804(b)(5) is a rule of reliability, truthfulness, trustworthiness and accuracy. *United States v. Ortiz,* ____ M.J. ____ (A.F.C.M.R. 1992). On this level, Aileen's statements to investigators matched the appellant's description of the offenses to a significant degree. *See State v. Swader,* 697 P.2d 557 (Or. App. 1985). We also find noteworthy that when Aileen was offered the opportunity in court to recant her out-of-court statements, she declined to do so. *Cf.*

*United States v. Crayton,* 17 M.J. 932 (A.F.C.M.R. 1984) (step-daughter's recantation made out-of-court statement unreliable).

We find that Aileen's statements of 9 and 20 June 1989, have "adequate indicia of reliability" to permit their admission in evidence. First, they were voluntary and not the result of leading or suggestive questions. Second, there is no apparent motive for her to falsely accuse her father. Third, the appellant's admissions to law enforcement officers confirm the reliability of the declarant's statements. And fourth, the statements were in detail and under oath.

The purpose of Rule 804(b)(5) is to insure that the interests of justice will be served by the admission of the statement in evidence. The sexual abuse of children invariably occurs in private and far from the public eye. Often, juvenile victims of sexual abuse by family members are subjected to intensive familial pressure not to testify concerning what took place. Here, the statements were offered on a material fact and probative on the point for which they were offered. Finally, any misgivings about the reliability of Aileen's statements were put to rest by the appellant's admissions. *See United States v. Hines, supra* at 137, 138.

It is in the interests of justice to admit out-of-court statements of sexually abused juveniles when such statements have the necessary "indicia of reliability" and "circumstantial guarantees of trustworthiness" to justify their admission. We conclude that such conditions exists here. *United States v. Gans,* 32 M.J. 412 (C.M.A. 1991); *United States v. Morgan,* 31 M.J. 43 (C.M.A. 1990); *United States v. Martindale,* 30 M.J. 172 (C.M.A. 1990); *United States v. Gibson,* 29 M.J. 379 (C.M.A. 1990); *United States v. Quick,* 26 M.J. 460 (C.M.A. 1988); *see also United States v. Spotted War Bonnet,* 933 F.2d 1471 (8th

Cir. 1991). The decision to admit such statements lies within the sound discretion of the trial judge, and his ruling will not be disturbed unless he clearly abuses that discretion. *United States v. Ortiz, supra; United States v. Spotted War Bonnet, supra.* We find no abuse of discretion here.

**DENIAL OF WITNESS REQUEST**

Six days before trial, the defense requested that Aileen's step-father, Walter E. Hall of Salem, Oregon, be made available at the trial in Germany. Mr. Hall would have testified that Aileen lacked truthfulness and credibility and had made false allegations of sexual abuse against him. The defense averred that Hall's testimony was of "crucial importance" as it concerned "a matter so similar to the current allegations . . . [and would be] admissible under Military Rule of Evidence 608(a)."

Since no subpoena power exists to force Hall to go to Germany to testify in the appellant's trial, the Government fulfilled its obligation to the appellant by offering him invitational travel orders with all expenses paid. Hall made it clear to the assistant trial counsel who spoke with him by phone that he had no intention of testifying and that "it would take a valid subpoena . . . to force him to come into a . . . court and give his testimony." The trial judge ruled that Hall was unavailable. *See* Mil. R. Evid. 104(a); *United States v. Santiago-Davila, supra.* The prosecution offered to stipulate to Hall's testimony, and ultimately the appellant agreed to this.

The record establishes that the prosecution did everything it could to convince Hall to travel to Germany on the short notice the defense gave. If the defense truly thought Hall's testimony was of such central importance to a vital issue, and no adequate substitute for the testimony was

available, it should have sought either a continuance or an abatement of the proceedings until such time as Hall was available, R.C.M. 703(b)(3), or a change of venue, R.C.M. 906(b)(11). In light of the appellant's decision not to comply with these procedural alternatives but to stipulate to Hall's testimony, we find no violation of the Confrontation Clause of the Sixth Amendment or Article 46 of the Code. *See United States v. Davis,* 29 M.J. 357 (C.M.A. 1990).

**SUFFICIENCY OF THE EVIDENCE**

The appellant argues, both in the formal appellate pleadings and in his *Grostefon*[3] submission, that the evidence does not support a conviction of carnal knowledge (specification 2, of Charge I). We agree. While there is abundant evidence that the appellant rubbed his penis between Aileen's legs and outside her vaginal area, there is no direct evidence that penetration was achieved. Appellate government counsel maintain that the appellant's admission "I . . . rubbed my penis on her vagina" and his statement to Aileen that "I'm going to stick it all the way in . . ." circumstantially establishes that sexual intercourse was accomplished. Aileen, however, also indicated that when she said "no" to the appellant's proposal to "stick it all the way in," he laughed and begin to kiss her neck and breasts, implying that his attention was diverted. Also, the reason Aileen decided to report her father's sexual abuse on Friday was her fear that "he would try to take advantage of me on Saturday." This, when considered with the appellant's prior stated intention "to have" Aileen in return for letting her use his baseball glove, suggests that the appellant had not yet had sexual intercourse with his daughter.

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[3] *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

In summary, we are not convinced beyond a reasonable doubt that the appellant had sexual intercourse with his 14-year-old daughter. Thus, his conviction of carnal knowledge cannot stand. Article 66(c), UCMJ. There is, however, overwhelming proof that he is guilty of attempted carnal knowledge in violation of Article 80 of the Code. *See United States v. Langford,* 46 C.M.R. 1058 (A.F.C.M.R. 1973). We may, of course, properly affirm any lesser included offense supported by the evidence. Article 59(b), UCMJ; *United States v. Gately,* 13 M.J. 757 (A.F.C.M.R. 1982). Attempted carnal knowledge is a lesser included offense of carnal knowledge. MCM 1984, Part IV, para. 45d(2)(b); *United States v. Langford, supra.*

Only so much of the findings of guilty of specification 2 of Charge I as find the appellant guilty of the lesser included offense of attempted carnal knowledge in violation of Article 80, UCMJ, are affirmed. We will reassess the sentence in our decretal paragraph.

**MULTIPLICITY**

Appellate defense counsel claim that the offenses alleged in the specifications of Charge III which occurred over a 17-month period "constituted but a single course of criminal conduct" and the trial judge erred when he refused to consider them multiplicious for sentencing.

We find no error in the trial judge's ruling that the offenses were separate for punishment. They took place at different times and locations. The offenses were not the result of a single impulse or continuous flow of events that continued uninterrupted but had days and sometimes months in between. *See United States v. Crowe,* 30 M.J. 1144 (A.F.C.M.R. 1990). These circumstances afforded the appellant an opportunity to reflect on his conduct and

chose to refrain from committing additional misconduct. *United States v. Jobes,* 20 M.J. 506 (A.F.C.M.R. 1985), *pet. denied* 21 M.J. 102 (C.M.A. 1985). The appellant was properly punished for all three offenses.

**SENTENCE APPROPRIATENESS**

Reassessing the sentence based upon the modified findings of guilty and the entire record, we find appropriate only so much there of as provides for a dishonorable discharge, 9 years confinement, and reduction to E-1. *United States v. People,* 29 M.J. 426 (C.M.A. 1990); *United States v. Sales,* 22 M.J. 305 (C.M.A. 1986). The reassessed sentence is not inappropriate given the nature of the offenses and the circumstances surrounding them. For the reasons stated, the findings of guilty and the sentence, both as modified, are

**AFFIRMED.**

Judges McLAUTHLIN and JAMES concur.

[SEAL OMITTED]

OFFICIAL

/s/ Laura L. Green
LAURA L. GREEN
Clerk of Court
Court of Military Review

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No. 94-190

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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ALVA Z. McGRATH, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether a military judge properly admitted a child abuse victim's out-of-court statements under a residual hearsay exception, after the victim refused to testify at trial.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-35a) is reported at 39 M.J. 158. The opinion of the Air Force Court of Military Review (Pet. App. 36a-49a) is unreported.

### JURISDICTION

The decision of the Court of Military Appeals was entered on May 6, 1994. The petition for a writ of certiorari was filed on August 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

## STATEMENT

Petitioner, a member of the United States Air Force, was convicted by a general court-martial, the military judge sitting alone, of carnal knowledge, sodomy, and indecent acts with his 14-year-old daughter, in violation of Articles 120, 125, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 920, 925, and 934. He was sentenced to a dishonorable discharge, confinement for 120 months, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review modified the findings and sentence and affirmed. Pet. App. 36a-49a. The Court of Military Appeals granted discretionary review and affirmed the judgment of the Air Force Court of Military Review. *Id.* at 1a-22a.

1. On June 9, 1989, petitioner's 14-year-old daughter (whom we identify as A.M.) told a school counselor that she had been sexually abused by petitioner, her natural father. The counselor notified the Mental Health Clinic at Hahn Air Base, Federal Republic of Germany, the Air Force Office of Special Investigations (OSI), and the base legal office of those allegations. OSI Special Agent Kenneth Sallinger and Ms. Leann Steinbach, a German national associated with the OSI, took A.M. to the Mental Health Clinic, where they were joined by Captain Timothy Friesen, a staff psychologist who had had previous contact with the victim. Also present were Captain Deborah Hall, an attorney with extensive experience in prosecuting child abuse cases, and Sergeant Donitta Gardiner, a technician assigned to the Mental Health Clinic who already knew the victim. 2 R. 54-58, 78-82; 3 R. 171.

A.M. talked in general terms about the allegations, but she became increasingly embarrassed and uncom-

fortable. Captain Friesen and Agent Sallinger left, while Captain Hall continued the interview. Captain Hall was not aware of what specific allegations had been made and did not offer suggestions to the victim as to what might have happened. A.M. demonstrated petitioner's actions using anatomically correct dolls. She appeared embarrassed and slightly upset, but remained in control during the interview, which lasted between 30 minutes and an hour. Following the interview, Captain Hall and Agent Sallinger took A.M. to the OSI offices, where the victim repeated her statement and Captain Hall typed it on a computer. A.M. sat next to Captain Hall while she typed, making corrections and additions. A.M. read the completed statement from the computer screen, read it again after it was printed, and signed it under oath. She did not recant or retract any of the statements made during the interview at the Mental Health Clinic. She understood the words used in the statement, including specific sexual terms, and appeared to understand the oath that she took prior to signing the statement. 2 R. 56-63, 69.

On June 20, 1989, A.M. returned to the OSI office and told Agent Sallinger that she had more information about her prior allegations and about other acts of her father. Agent Sallinger followed the same dictation process that Captain Hall had used to reduce the victim's statement to writing. A.M. appeared a "little bit nervous" but was in control at that time. She proofread the statement as it was being typed and made corrections. Agent Sallinger did not offer suggestions or make any corrections other than those requested by the victim. A.M. read the printed statement, took another oath, and signed the statement without hesitation. The meeting lasted approximately an hour. 2 R. 98-102, 109.

2. The prosecution called A.M. as a witness at petitioner's trial. She testified that she was 14 years old and was petitioner's daughter. When asked about the allegations and the statements she provided, she refused to answer. A.M. acknowledged that she was present at trial pursuant to an order from German civil authorities, but she stated that she had no intention of testifying against her father and she repeatedly replied "I refuse to answer that" when questioned about the abuse. A.M. acknowledged the importance of the oath she took prior to testifying and in connection with each of the statements, and she specifically denied lying under oath in her prior statements. The military judge explained to the victim the importance of her testimony and of resolving the allegations against her father. A.M. steadfastly refused to testify, explaining that she did not want her father to go to jail. 2 R. 19-25, 40-49.

The prosecution sought to admit A.M.'s out-of-court statements under Mil. R. Evid. 804(b)(5), the residual hearsay exception for statements by unavailable declarants. The military judge found that the victim was unavailable under Mil. R. Evid. 804(a)(2). 2 R. 52. He then heard testimony from Captain Hall and Agent Sallinger concerning the circumstances under which the statements were made. 2 R. 53-127. Defense counsel objected to the admission of the statements and offered the testimony of four witnesses to impeach the reliability of those statements. 2 R. 128, 148; 3 R. 149-164, 168-195. At the conclusion of the hearing, the military judge concluded that the victim's statements were admissible under Mil. R. Evid. 804(b)(5). 3 R. 211.

The court specifically found that (1) the statements were made by the victim; (2) the statements were evidence of material facts in the case pertaining to the allegations of sexual misconduct; (3) the statements

were more probative on the issue of whether sexual misconduct occurred than any other evidence that the government could procure through reasonable means; (4) because the victim had refused to testify, the statements were the only form in which the victim's allegations could have been presented to the court; and (5) the general purposes of the Military Rules of Evidence and the interests of justice would be served by admission of the victim's statements. The military judge thereafter admitted petitioner's confession, finding that it was voluntary and sufficiently corroborated by A.M.'s out-of-court statements. 3 R. 211-214, 218-219. See Pet. App. 22a-26a (excerpts of the military judge's ruling).

3. The Air Force Court of Military Review ruled that A.M.'s out-of-court statements were properly admitted under Mil. R. Evid. 804(b)(5). Pet. App. 40a-46a. The Court of Military Appeals agreed and specifically rejected petitioner's contention that the admission of those statements violated petitioner's rights under the Sixth Amendment's Confrontation Clause. See *id.* at 9a-22a. The Court of Military Appeals explained that although A.M. was unwilling to testify at trial on behalf of the prosecution, petitioner could have cross-examined A.M. about her out-of-court statements, but he waived that opportunity at trial. *Id.* at 13a-14a.

## ARGUMENT

1. Petitioner contends (Pet. 8-10) that the Court should review this case to decide whether a court must find that a witness is unavailable before it can apply the Confrontation Clause analysis set out in *Idaho* v. *Wright*, 497 U.S. 805 (1990). That issue is not presented here, because the lower courts concluded that the declarant was unavailable as a witness for the prosecution in this case.

In *Wright*, the Court held the admission of a child's out-of-court statements under an Idaho residual hearsay exception, Idaho R. Evid. 803(24), violated the Confrontation Clause. The Court noted that in "the usual case" the Confrontation Clause requires the prosecution to "produce, or demonstrate the unavailability of, the declarant" before using a hearsay statement against the defendant. 497 U.S. at 814 (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980)). But the Court also noted that there are exceptions to that general rule. 497 U.S. at 815. For example, the Court held in *United States* v. *Inadi*, 475 U.S. 387, 394-400 (1986), that the prosecution does not need to show unavailability before admitting the out-of-court statements of a non-testifying co-conspirator. See 497 U.S. at 815. The Court did not resolve whether the prosecution needed to show whether the child in *Wright* was unavailable, see *id.* at 816, holding that the child's out-of-court statements were inadmissible in any event because they lacked sufficient indicia of reliability, *id.* at 816-827.

Petitioner correctly notes that the Court left open whether the Confrontation Clause requires the prosecution to show that a declarant is "unavailable" before invoking a residual hearsay exception. That issue, however, is not squarely presented here, because the lower courts concluded that A.M. was "unavailable" in the sense that she refused to testify on the prosecution's behalf. 2 R. 52. The military judge specifically noted that "considering the refusal of [A.M.] to testify in this case, the [out-of-court] statements are the only form in which the victim's allegations can be presented to the court." Pet. App. 23a. The Air Force Court of Military Review concluded that "the trial judge was correct in taking [A.M.] at her word that she would not testify, and finding her 'unavailable' within the meaning of the

residual hearsay exception." *Id.* at 43a. Hence, the question left open in *Wright*—whether the prosecution may obtain admission of hearsay from an available declarant under a residual hearsay exception—was not decided and is not presented in this case.

2. Petitioner contends (Pet. 10-14) that this Court should determine whether "a witness' appearance solely to announce her refusal to testify constitutes unavailability for purposes of the Confrontation Clause." This Court has already made clear, however, that the question of whether a witness is "unavailable" is determined through a practical assessment of the facts in the particular case. As the Court explained in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), a declarant should be considered unavailable only after the prosecution has "made a *good-faith effort* to obtain his presence at trial." *Id.* at 74. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Ibid.* (quoting *California* v. *Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring)). Accord *United States* v. *Ortiz*, 35 M.J. 391, 393 (C.M.A. 1992) ("[t]he extent of this good-faith effort is defined by a reasonableness standard, because the Court also held that '[t]he law does not require the doing of a futile act'" (quoting *Roberts*, 448 U.S. at 74)).

The courts below correctly concluded that A.M. was unavailable as a witness for the prosecution. At trial, the prosecution had utilized the Status of Forces in Germany agreement under the North Atlantic Treaty Organization, Aug. 3, 1959, 481 U.N.T.S. 262, to obtain a subpoena from the Federal Republic of Germany to secure the victim's presence at trial. 2 R. 26; 4 R. App. Exh. VI. The subpoena directed A.M. to appear at the court-martial proceeding, but did not require her to testify, and petitioner's defense counsel argued that

under German law A.M. could not be compelled to testify against her father. 2 R. 26-27 (citing U.S. Air Forces in Europe Pamphlet 30-16 (1984) (4. R. App. Exh. VII). The prosecutor agreed that the military judge had no way of enforcing an order requiring a civilian residing in Germany to testify in the military proceeding. See also 2 R. 27-33.

The military judge did not explicitly resolve whether he could compel A.M. to testify, but at the prosecutor's request—and over defense counsel's objection—he attempted to use "moral persuasion" to convince her to testify. 2 R. 33-40. Despite a lengthy colloquy with the military judge, A.M. refused to provide any testimony that would incriminate her father. 2 R. 40-49. At the conclusion of the colloquy, the judge expressed doubt that he could enforce an order requiring A.M. to testify, and the judge accordingly concluded that she was unavailable as a witness within the meaning of Mil. R. Evid. 804(a)(2). See 2 R. 49-52.

As the courts below concluded, the prosecution made an adequate "good faith effort" to obtain A.M.'s testimony. The prosecution secured her presence at trial through a subpoena issued by the host country, and it encouraged the military judge to use the tools reasonably at his disposal to induce her to testify. See Pet. App. 43a. As petitioner concedes, the lower courts have found that witnesses are "unavailable" in the analogous situation where they invoke a Fifth Amendment privilege. See Pet. 13. Petitioner suggests that this Court's review is warranted because "[t]he facts in petitioner's case do not fit squarely" into any of those cases. Pet. 13-14. The factual situation here, however, does not "fit squarely" within any previous case, because this case is quite unusual. But rather than providing a reason for this Court's review, the unusual nature of

this case counsels against review, because the case does not present a question of general importance.

In any event, petitioner cannot fairly claim that his rights under the Confrontation Clause were compromised by A.M.'s refusal to testify. Although A.M. was unwilling to testify as a witness for the prosecution, she did appear in court and was available for the defense to examine with respect to her out-of-court statements. As the Court of Military Appeals concluded, petitioner waived that opportunity to cross-examine her. Pet. App. 13a. "Having thus eschewed confrontation, [petitioner] cannot now claim a denial of it." *Id.* at 14a.

3. Petitioner also contends (Pet. 14-19) that review is warranted "because lower courts have become entangled in the legal morass created by the overlap of the hearsay rule and confrontation rights." We submit that no such "morass" exists. This Court's decision in *Wright* established a framework for evaluating whether evidence offered under a residual hearsay rule has particularized guarantees of trustworthiness. See 497 U.S. at 820-825. Petitioner suggests that the Court's decision in *Wright* departed from the then-prevailing practice. Pet. 17. As petitioner acknowledges, however, the courts of appeals have been consistent in their interpretation and application of the *Wright* decision. Pet. 17-18. Thus, there is no need at this time for the Court to revisit that area of the law.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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